Office - Supreme Court, U.S.
FILED
DEC 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1857

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OREGON,

Petitioner,

v.

JAMES EDWARD BRADSHAW,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR PETITIONER

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
JAMES E. MOUNTAIN, JR.
Deputy Solicitor General
ROBERT E. BARTON
*THOMAS H. DENNEY
STEPHEN F. PEIFER
Assistant Attorneys General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED

Does a police officer violate the limits upon custodial interrogation established in *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Miranda v. Arizona*, 384 U.S. 436 (1966), by reminding an arrestee who inquires, "Well, what is going to happen to me now?" of the arrestee's previously asserted request for counsel and resuming his conversation with the arrestee, after the arrestee acknowledges that he understands his rights?

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Summary of Argument	8
Argument	13
I. The determination of whether an accused has waived his Fifth Amendment right to counsel should be based upon the totality of the circumstances, rather than the single-factor test of *Edwards v. Arizona*	15
II. Even if *Edwards v. Arizona* established a *per se* rule, the Oregon Court of Appeals misapplied it in this case	34
Conclusion	43

TABLE OF AUTHORITIES

Cases Cited

	Page
Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942)	32
Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981)	41
Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), *cert. denied* 424 U.S. 947 (1976)	20
Coble v. State, 274 Ark. 134, 624 S.W.2d 421 (1981), *cert. denied* ___ U.S. ___ (1982)	41
Commonwealth v. Harris, ___ Pa. Super. ___, 443 A.2d 851 (1982)	31
Dillard v. State, 275 Ark. 320, 629 S.W.2d 291 (1982)	38
Edwards v. Arizona, 451 U.S. 477 (1981)	Passim
Escobedo v. Illinois, 378 U.S. 478 (1964)	15, 16
Fare v. Michael C., 442 U.S. 707 (1979)	28
Hunt v. State, 632 S.W.2d 640 (Tex. Crim. App. 1982)	22
Johnson v. Zerbst, 304 U.S. 458, 464 (1938)	33
Leuschner v. State, 49 Md. App. 490, 433 A.2d 1195 (1981), *cert. denied* ___ U.S. ___ (1982)	39
Michigan v. Mosley, 423 U.S. 96 (1975)	Passim
Michigan v. Tucker, 417 U.S. 433, 444 (1974)	24
Miranda v. Arizona, 384 U.S. 436 (1966)	Passim
Nash v. Estelle, 597 F.2d 513 (5th Cir.), *cert. denied* 444 U.S. 981 (1979)	20
North Carolina v. Butler, 441 U.S. 369 (1979)	28
People v. Smith, 120 Cal. App.3d 746, 174 Cal. Rptr. 916 (1981)	26
People v. Thomas, 98 Ill. App. 3d 852, 54 Ill. Dec. 235, 424 N.E.2d 985 (1982), *cert. denied* ___ U.S. ___ (1982)	39
People v. Wegman, 101 Ill. App. 3d 634, 57 Ill. Dec. 87, 428 N.E.2d 637 (1981)	41

Rhode Island v. Innis, 446 U.S. 291 (1980) 30, 35

State v. Blakney, ___ Mont. ___, 641 P.2d 1045 (1982) 40

State v. Collins, 30 Wash. App. 1, 632 P.2d 68 (1981) 26

State v. Dominguez, 97 N.M. 592, 642 P.2d 195 (N.M. App. 1982) 22

State v. Emery, 131 Ariz. 493, 642 P.2d 838 (1982) 30

State v. Grisby, 97 Wash. App. 2d 493, 647 P.2d 6 (1982) 41

State v. Innis, ___ R.I. ___, 433 A.2d 646 (1981) *(on remand)*, cert. denied ___ U.S. ___ (1982) 30

State v. Johnson, 318 N.W.2d 417 (Iowa 1982) 41

State v. Killay, 430 A.2d 418 (R.I. 1981) 41

State v. McCloskey, 90 N.J. 18, 446 A.2d 1201 (1982) 22, 26

State v. Piatt, 132 Ariz. 145, 644 P.2d 881 (1981) 41

State v. Pittman, 210 Neb. 117, 313 N.W.2d 252 (1981) 40

State v. Ruth, 102 Idaho 638, 637 P.2d 415 (1981) 41

Trest v. State, 409 So.2d 906 (Ala. Crim. App. 1981) 30

United States ex rel. Kimes v. Greer, 541 F. Supp. 632 (N.D.Ill. 1982) 22

United States v. Gordon, 655 F.2d 478 (2d Cir. 1981) 41

United States v. Grant, 549 F.2d 942 (4th Cir.), *cert. denied* 432 U.S. 908 (1977) 20

United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981), *aff'd.* 672 F.2d 115 (D.C. Cir. 1982) 22

United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.), *cert. denied* 436 U.S. 919 (1978) 20, 29

United States v. Thierman, 678 F.2d 1331 (9th Cir. 1982) 30

United States v. Webb, 633 F.2d 1140 (5th Cir. 1981) 41

United States v. Wilson, 571 F.2d 455 (9th Cir. 1978) 20, 31

Vaughn v. State, 248 Ga. 127, 281 S.E.2d 594 (1981) 22, 26

Wantland v. State, 49 Md. App. 636, 435 A.2d 102 (1981) *cert. denied* ___ U.S. ___ (1982) 41

White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979) 20, 31

Wyrick v. Fields, ___ U.S. ___, 51 U.S.L.W. 3411 (No. 82-158, Nov. 29, 1982) 13, 37 43

Constitutional and Statutory Provisions

U.S. Const., Amend. V 1

U.S. Const., Amend. XIV, § 1 1

28 U.S.C. § 1257(3) 1

Other Authorities

Fifth Amendment — Waiver of Previously Invoked Right - Counsel, 72 Jour. of Crim. Law & Criminology, 1288, 1303 n. 87 (1981) 27

Inbau and Reid, *Criminal Interrogation and Confessions* (2d ed. (1967) 28

The Supreme Court, 1980 Term, 95 Harv. L. Rev. 93, 131 n. 59 (1981) 24

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Oregon Court of Appeals reversing Bradshaw's conviction (Petition for Certiorari, at 10-13) is reported at 54 Or. App. 949, 636 P.2d 1011 (1981). The order of the Oregon Supreme Court denying the State's petition for review of the decision of the court of appeals (Petition for Certiorari, at 14) is reported at 292 Or. 568, 644 P.2d 1129 (1982).

JURISDICTION

The decision of the Oregon Court of Appeals was entered on December 1, 1981. The Oregon Supreme Court denied the State's timely petition for discretionary review on February 3, 1982. The State's petition to this Court for a writ of certiorari was timely filed 60 days thereafter, pursuant to Rule 20.1, on April 5, 1982. The Court's jurisdiction is based on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

United States Constitution, Amendment XIV, § 1:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Bradshaw was convicted in an Oregon trial court of manslaughter in the first degree, driving while under the influence of intoxicants, and driving while his operator's license was revoked. His sole contention on appeal was that the trial court erred by admitting evidence of his statement to a state police polygraph examiner. In that statement Bradshaw admitted that he was the driver of the vehicle involved in the fatal accident which gave rise to the criminal charges. Bradshaw contended that the statement was obtained in violation of his rights under the Fifth and Fourteenth Amendments.

On the evening of Saturday, September 13, 1980, Bradshaw was found unconscious on the ground between a cabin occupied by Lowell Reynolds and the residence where Bradshaw was staying in Rockaway, Oregon (Tr. 134-135, 144).[1] Bradshaw had a large laceration on the back of his head. He complained of head and chest pains, and was extremely intoxicated (Tr. 135). He claimed that he had been knocked unconscious at a party in Reynolds' cabin and had found no one in the cabin when he regained consciousness (Tr. 135-136). He was taken to a hospital. The Rockaway police began

---

[1]In this brief, "Tr." refers to the transcript of the trial court proceedings in this case; "J.A." refers to the joint appendix; and "Ex." refers to the transcript of Bradshaw's tape-recorded statement to Corporal Hays on September 14, 1980, Exhibit 2 in the pretrial proceedings and Exhibit 4 in the trial itself.

looking for witnesses to the alleged assault, including Reynolds (Tr. 136-139).

On the afternoon of the next day, September 14, Reynolds' body was found in his wrecked pickup truck (Tr. 85-86, 92). He had obviously been dead for some time (Tr. 107-108). From the position of the body, it appeared that Reynolds had been a passenger in the vehicle when it had left the highway, struck a tree and an embankment, and ultimately come to rest on its side, in a shallow creek (Tr. 86-87, 103-104, 108-110). The cause of his death was traumatic injury, coupled with asphyxia by drowning (Tr. 168-169, 171, 178).

That evening, in the course of his investigation into the accident, State Police Corporal Gerald Hays went to Reynolds' cabin, along with the Rockaway police officer who was investigating the alleged assault upon Bradshaw. At the cabin, they met Bradshaw and discussed both the accident and the alleged assault (J.A. 6-8; Tr. 13-14). Bradshaw's description of the events of the prior evening and the people allegedly present in Reynolds' cabin was not consistent with information the police received from others (J.A. 9-10; Tr. 15-16). Hays therefore asked Bradshaw to accompany him to the Rockaway Police Station to make a tape-recorded statement,

and Bradshaw did so willingly (J.A. 10-11; Tr. 16-17).

At the police station, Hays, who regarded Bradshaw as a "possible suspect," but not a "focal suspect," in Reynolds' death (J.A. 25, 27; Tr. 30, 32-33), advised Bradshaw of his *Miranda*[2] rights and the nature of the investigation he was conducting. Bradshaw acknowledged that he understood these matters and that he was free to leave (J.A. 45-47; Ex , at 1-3). He then stated that on the previous evening, he and Reynolds had been drinking in Reynolds' cabin. Bradshaw said that others had joined them, and he had been struck from behind by one of the later arrivals, after a heated exchange of words (J.A. 48-53; Ex., at 3-8). He admitted buying the beer and whiskey consumed on this occasion. He indicated a willingness to face prosecution for furnishing liquor to a minor, in view of the fact that Reynolds was under legal drinking age (J.A. 59-60; Ex., at 13-15). Bradshaw denied ever riding in Reynolds' truck, and he admitted that his right to drive in Oregon had been revoked (J.A. 62-65; Ex.,

---

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966). When asked, on cross-examination, why he had advised Bradshaw of his rights if he was not in custody, Hays replied:

> "I wanted to be sure to cover every possible angle and that at some point he may have said something that may have incriminated him, you know. Being somewhat familiar with the law, but not an expert, I wanted to be sure that I covered every angle. It's our policy that whenever we do interview an individual on a serious or possible serious nature [*sic*] like this, that his rights are made available." (J.A. 26; Tr. 32).

at 16-19). He declared himself ready to help the police in their investigation into Reynolds' death and suggested that Reynolds may have met with "foul play" at the hands of the person who allegedly had struck Bradshaw (J.A. 66-69; Ex., at 21-23).

At this point, Hays placed Bradshaw under arrest for furnishing liquor to a minor. Hays told Bradshaw that he was no longer free to leave and readvised him of his *Miranda* rights (J.A. 70-71; Ex., at 24-25). He informed Bradshaw that the police had interviewed several of the persons whom Bradshaw had named as witnesses to the alleged assault, and that those persons had witnesses to the fact that they had not been in Reynolds' cabin at the time the assault supposedly occurred. He then suggested, as a "theory," that Bradshaw had been driving Reynolds' truck the night before, had run off the road because he was intoxicated, had panicked and returned home, and was fabricating the story of the assault upon himself in order to account for the injuries he had received in the accident (J.A. 71-72; Ex., at 25). Bradshaw rejected Hays' suggestion. He insisted that he had witnesses to corroborate his story. He stated, "And I do want an attorney before it goes very much further" (J.A. 72; Ex., at 25-26).

Hays immediately terminated the conversation and handcuffed Bradshaw (J.A. 14, 16; Tr. 20, 22).

Shortly thereafter, and apparently while still at the police station, Bradshaw asked Hays, "Well, what is going to happen to me now?" (J.A. 16; Tr. 22).

According to Hays' uncontroverted testimony, the following occurred:

> ". . . I says [*sic*], 'You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say — because — since you have requested an attorney, you know, it has to be at your own free will.' I says [*sic*], 'I can't prevent you from talking, but you understand where your place — you know, where your standing is here?' and he agreed. He says [*sic*], 'I understand,' and — you know, and we had conversation from then on . . . ."

In the course of the ensuing conversation, and apparently while driving to the county jail, Hays suggested that Bradshaw submit to a polygraph examination to "clear this matter up and find out actually what happened." Bradshaw again expressed a desire to cooperate with the police, and he agreed to submit to this examination (J.A. 17-18; Tr. 23-24).

Late the next morning, at the county courthouse, Bradshaw submitted to a polygraph examination administered by State Police Trooper William Rainey. Prior to the examination, Rainey advised Bradshaw of his *Miranda* rights. Bradshaw executed a written consent to the examination (J.A. 30-33; Tr. 42-45). After the examination, Rainey told Bradshaw that in his opinion, Bradshaw had not been truthful in his answers to questions about

having driven Reynolds' truck. Bradshaw thereupon admitted to Rainey that, on September 13, he had passed out behind the wheel of the Reynolds' truck while driving Reynolds to a party, after the two of them had consumed a considerable amount of alcohol at Reynolds' cabin. (J.A. 33-35; Tr. 45-47).

At the conclusion of the pretrial hearing on the admissibility of evidence of Bradshaw's statements to Trooper Rainey, the trial court ruled as follows:

> "I find that the statements made to Officer — or, to Corporal Rainey were admissible. The evidence establishes that there were no threats, promises, or inducements, that the defendant was properly advised of his rights and that he did understand them and I also find that the evidence supports a conclusion that although Mr. Bradshaw had indicated his intent to have an attorney before it goes very much further, that within a short time after he made that statement he was initiating conversations in spite of the officer's replying to him, 'I can't talk with you,' and that I think that when I look at the total context of this, that there was, in fact, a change of this man's mind, that it was not brought on by any persuasion or argumentative kind of statements that were improper in any way and that the statements finally made to Officer Rainey — or, to Corporal Rainey were voluntary and followed a waiver and a knowing waiver of his right to remain silent . . . ." (J.A. 42-43; Tr. 81-82).

During Bradshaw's nonjury trial, his admissions to Rainey were introduced into evidence by a stipulation that Rainey's testimony at trial would be the same as it was in the pretrial hearing (Tr. 147-149). Bradshaw was found guilty of first degree man-

slaughter, driving under the influence of intoxicants, and driving while his license was revoked.

On Bradshaw's appeal, the Oregon Court of Appeals held that, notwithstanding the trial court's findings of fact, Bradshaw's statements to Trooper Rainey were erroneously admitted into evidence. The Oregon court based its conclusion upon this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981). The court of appeals reasoned that Bradshaw had not knowingly and intelligently waived the right to counsel that he had previously asserted during his conversations with Corporal Hays:

> " . . . We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, [Hays] clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.
>
> "The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. . . ." *State v. Bradshaw*, 54 Or. App. 949, 953, 636 P.2d 1011, 1013 (1982) [Petition for Certiorari, at 13].

SUMMARY OF ARGUMENT

I

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the

majority of the Court indicated that once an arrestee has invoked his *Miranda* right to the assistance of counsel during custodial interrogation, it is a prerequisite for a subsequent waiver of that right that the arrestee "initiate" the further conversation which leads to the waiver. The majority opinion in *Edwards* has been interpreted, both by commentators and by lower courts, as declaring a strict "*per se* rule" which absolutely prohibits reviewing courts from finding a valid waiver of a previously asserted right to counsel, unless the accused reopens the dialogue with the authorities.

Interpreted this way, *Edwards* reaches an anomalous result. *Miranda* was concerned with protection of the accused's Fifth Amendment privilege against self-incrimination in the context of custodial interrogation. It recognized an accused's right to remain silent and right to the presence of counsel. Yet the majority opinion in *Edwards* unaccountably establishes different tests for these two aspects of the Fifth Amendment privilege. The majority opinion suggests that waiver of a previously invoked right to counsel is governed by a test different from the standard enunciated in *Michigan v. Mosley*, 423 U.S. 96 (1975), for waiver of a previous assertion of the right to remain silent. In *Mosley*, the Court held only that an arrestee's invocation of his rights under *Miranda* must be

scrupulously honored, but a waiver of previously asserted rights could nevertheless be shown to have been made intelligently and voluntarily, under the totality of the circumstances in which the alleged waiver occurred.

As a rationale for employing additional safeguards when an accused has invoked the right to counsel, rather than the right to remain silent, the *Edwards* majority suggested that the Court has traditionally regarded the right to counsel as requiring even greater protection than the right to remain silent. Whatever the relative value of the two rights may be, the standard for determining whether one facet of the accused's rights under *Miranda* has been waived should not be different from the standard for determining whether there has been a valid waiver of the other.

Miranda itself suggests no such distinction. To the contrary, the right it gave arrestees to the assistance of counsel was intended to further the basic right to remain silent during custodial interrogation. Logically, waiver of the derivative right to counsel should not be tested by more stringent standards than those used to judge waiver of the basic right to remain silent. Moreover, none of the Court's pre-*Edwards* decisions requires the distinction which the *Edwards* majority suggests.

Prior to *Edwards*, most lower courts drew no distinction between the standards to be applied in assessing waivers of the two *Miranda* rights. This fact at least indicates that the lower courts saw little authority in this Court's holdings for drawing such a distinction. It even suggests that they saw little practical necessity for requiring such a distinction.

The *Edwards* doctrine should not be extended to invalidate admissions made contemporaneously with readvisal of *Miranda* rights and substantially subsequent to initial conversations with police. Admittedly, whether the accused "initiated" the conversation with the authorities which followed his invocation of the right to counsel is a very significant factor to be considered in determining whether he waived that right. Still, it should not be regarded as absolutely dispositive. The accused may have invoked the right to counsel for any number of reasons. The authorities may have any number of legitimate reasons for reopening conversation with the accused. What constitutes "initiation" of any subsequent conversation may itself be open to dispute, as the present case demonstrates. And the tone and content of any subsequent conversation between the accused and the authorities obviously affects the validity of the accused's waiver of his

previously invoked right to counsel, regardless of who initiated the conversation.

For all of these reasons, the test for finding a valid waiver of a previously asserted *Miranda* right to counsel should be the same as the one enunciated in *Michigan v. Mosley* for finding a valid waiver of a previously asserted *Miranda* right to remain silent: was the accused's invocation of the right scrupulously honored, and was there a knowing and voluntary waiver of that right under the totality of the circumstances?

II

Even if *Edwards v. Arizona* establishes a "*per se* rule" concerning waiver of a previously invoked right to counsel, the Oregon Court of Appeals misapplied that rule in this case. Bradshaw "initiated" the further conversation in this case, by inquiring "[W]hat is going to happen to me now?" This inquiry is sufficient "initiation" of further conversation to invoke the "totality-of-circumstances" test which must be applied, under any reasonable interpretation of *Edwards*, when the accused himself initiates further conversation. *See* 451 U.S. at 486 n. 9. When, as in this case, the arresting officer delays the resumption of substantive conversation with the arrestee until he has obtained a further acknowledgment that the arrestee understands that he is waiving his previously asserted right, more is not

required to make the fruits of their subsequent conversation admissible. In holding to the contrary, the decision of the Oregon Court of Appeals is manifestly at variance with this Court's post-*Edwards* disposition of *Wyrick v. Fields*, ___ U.S. ___ , 51 U.S.L.W. 3411 (No. 82-158, Nov. 29, 1982), and with all decisions of other jurisdictions which discuss the concept of "initiation" suggested in *Edwards*.

ARGUMENT

In this state criminal prosecution, the Oregon Court of Appeals erroneously construed the Fifth Amendment, applicable by virtue of the Fourteenth Amendment. The court misread and misapplied *Edwards v. Arizona*, 451 U.S. 477 (1981), when it ruled that evidence of Bradshaw's incriminating statements to the state's polygraph operator should not have been admitted at his trial. The court held that, when Bradshaw expressed to Corporal Hays a desire to have "an attorney before it goes very much further," the police were forbidden to question him any further without providing counsel unless defendant himself initiated the incriminating conversation. The court concluded that subsequent conversations, including the polygraph examination on the following morning, were conducted at the instance of the police and in direct violation of defendant's rights. The fact that Bradshaw had asked Hays,

"Well, what is going to happen to me now?" after initially requesting the presence of counsel, was deemed insignificant by the court of appeals. Hence, the court held that Bradshaw did not make a valid waiver of rights prior to his incriminating statements.

The court of appeals evidently perceived the standard announced in *Edwards* as a *per se* rule forbidding any further police questioning after an accused's invocation of the right to counsel. If that perception is correct, this case demonstrates the error of that rule. This Court should take this opportunity to reexamine *Edwards* in light of the basic premises of *Miranda v. Arizona*, 384 U.S. 436 (1966), traditional concepts of waiver of constitutional rights, and the inherent faults in a *per se* rule.[3] The proper focus of the inquiry here should be on determining whether there was a voluntary, intelligent, and knowing waiver of the right to counsel, based upon an evaluation of the totality of the circumstances. Such a test safeguards the rights of the accused in a more realistic fashion without eliminating the possibility of waiver. This test,

---

[3]Because *Edwards* provides an exception for defendant-initiated conversations after invocation of a right to counsel, it is, technically speaking, a qualified *per se* rule. However, if one assumes, as the court of appeals did, that there is no initiation by the defendant, then the absolute nature of the restriction on future police-initiated questioning certainly becomes a *per se* rule. Accordingly, when the term "*per se* rule" is used in this brief, it refers to a situation without post-invocation initiation by the defendant.

rather than a single-factor test suggested by *Edwards*, better achieves the goals of *Miranda* by restoring credibility to the process of police questioning in the context of the Fifth Amendment.

Even if this Court does not modify the *Edwards* rule, it should conclude nevertheless that the court of appeals erred in applying the rule to this case. It is evident that defendant, not the police, reopened the dialogue and thereby unilaterally abandoned his request for counsel. *Edwards* requires a multi-factor analysis from that point forward. The totality of the circumstances demonstrates that Bradshaw voluntarily, intelligently, and knowingly waived his rights, up to and including the point where he made an incriminating admission to the polygraph operator.

I

The determination of whether an accused has waived his Fifth Amendment right to counsel should be based upon the totality of the circumstances, rather than the single-factor test of *Edwards v. Arizona*.

Any discussion of this case logically begins with *Escobedo v. Illinois*, 378 U.S. 478 (1964), the predecessor to *Miranda v. Arizona*, *supra*. Police in *Escobedo* interrogated the accused prior to charging him formally. They failed to inform him of his right to silence, denied his request to consult with an

attorney, and informed him that they had convincing evidence of guilt. This Court concluded that evidence of the suspect's ensuing confession was inadmissible, because the authorities denied his request for counsel. The Court concluded:

> ". . . We hold only that when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." 378 U.S. at 492.

Escobedo, however, left unanswered many questions regarding police questioning of suspects, *e.g.*, how is the Fifth Amendment right to be protected and implemented, and what standards should govern waiver of the right? In an effort to provide clear guidelines, the five-member majority in *Miranda v. Arizona*, *supra*, prohibited the government from using statements arising out of custodial interrogation absent "procedural safeguards" which effectively protected the Fifth Amendment right against self-incrimination. The Court set forth the now-famous *Miranda* "warnings," and required that they be given unless the state devised other effective means to inform accused persons of their right to silence and to assure a continuing opportunity to exercise it. The right to counsel, previously recognized only as a Sixth Amendment concept, was held to be a necessary adjunct to the Fifth Amendment.

Without being given the opportunity to have counsel present, a custodial suspect could make no intelligent right-to-silence decision. 384 U.S. at 469-473.

Concerning the right to silence, the Court stated:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. * * *." (Footnote omitted.) 384 U.S. at 473-474.

In the same paragraph the Court similarly addressed the Fifth Amendment's companion right to counsel:

> "* * * If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." 384 U.S. at 474.

The Court nevertheless made it clear that a defendant may waive both his right to silence and the attendant right to counsel, provided that the waiver is made voluntarily, knowingly, and intelligently. 384 U.S. at 475.

In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court reexamined *Miranda*'s prohibitive language

regarding later questioning of a suspect who had invoked his right to remain silent. The police in *Mosley* arrested defendant in connection with some local robberies. After advice of *Miranda* rights, defendant declined to answer any questions, and the detective promptly ceased interrogation. Defendant at no time indicated a desire for counsel. Several hours later, another detective readvised defendant of his *Miranda* rights and questioned him about an arguably related homicide. Without seeking counsel or reinvoking his right to silence, defendant admitted his involvement in the killing.

Mosley claimed on appeal that the strict language of *Miranda* prevented any further questioning after his initial decision to remain silent. The Court reiterated *Miranda*'s attempt to establish a "set of safeguards" to protect an arrestee's Fifth Amendment rights, but it observed the inherent ambiguity of *Miranda*'s prohibition of interrogation after invocation of the right to silence. 423 U.S. at 99-102. Although *Miranda* stated that "the interrogation must cease," the Court in *Mosley* noted that *Miranda* said nothing about what circumstances, if any, would permit a resumption of questioning. Theoretically, the prohibition could be read literally to forbid any subsequent interrogation at any time or place on any subject, or to allow a resumption of interrogation after a momentary respite. Either of

these extreme literal interpretations would lead to "absurd and unintended results," the Court observed. 423 U.S. at 102. While interrogation after brief cessation would frustrate *Miranda*,

> "* * * [a]t the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Id.*

The Court concluded that

> "* * * neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." 423 U.S. at 102-103.

In following a "reasonable and faithful" interpretation of *Miranda*, the *Mosley* majority found the "critical safeguard" to be the person's "right to cut off questioning." 423 U.S. at 103. It is that right which *Miranda* requires to be "scrupulously honored." *Id.* The Court then reviewed the entire array of circumstances leading to Mosley's confession and concluded that the police had "scrupulously honored" his right to cut off questioning.

The *Mosley* majority expressly dealt only with the invocation of the right to silence and, other than quoting *Miranda*, made no attempt to examine a

similar situation involving the derivative right to counsel. 423 U.S. at 101 n. 7. However, this Court's rejection of a *per se* rule in *Mosley* prompted a number of lower courts to reject a *per se* prohibition of requestioning after assertion of the Fifth Amendment right to counsel. *See, e.g., White v. Finkbeiner*, 611 F.2d 186 (7th Cir. 1979), *vacated and remanded* 451 U.S. 1013 (1981), *on remand* 687 F.2d 885 (7th Cir. 1982); *United States v. Wilson*, 571 F.2d 455 (9th Cir. 1978); *United States v. Grant*, 549 F.2d 942 (4th Cir.), *cert. denied* 432 U.S. 908 (1977).[4]

The reasoning of the court in *White v. Finkbeiner*, *supra*, 611 F.2d at 192, is typical of that followed by other courts prior to *Edwards v. Arizona* on the question of "initiation":

> "* * * [T]here is no reason to conclude that as a prerequisite to a waiver, the suspect must have always initiated contact with the police [footnote omitted]. There may be instances where for some valid reason the police must contact the accused, and a confession follows this contact. * * * Of course, in those cases where the suspect does initiate the waiver, it will be much easier for the state to discharge its heavy burden of proving waiver. But this does not mean that where the police contact the suspect after a request for counsel the prosecution is prohibited from ever demonstrating a waiver."

---

[4]*See also United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied* 436 U.S. 919 (1978); *Cobbs v. Robinson*, 528 F.2d 1331 (2d Cir. 1975), *cert. denied* 424 U.S. 947 (1976); *but see Nash v. Estelle*, 597 F.2d 513 (5th Cir.), *cert. denied* 444 U.S. 981 (1979).

In short, before *Edwards*, courts generally applied a "totality of the circumstances" test to confessions obtained after an invocation of the right of counsel. Courts now agree, however, that *Edwards v. Arizona*, *supra*, drastically changed that approach.

In *Edwards* the Court unanimously agreed, albeit in three separate opinions, that defendant's statement was obtained in violation of his *Miranda* rights and thus was not admissible. The facts of the case involved extremely suspect police procedures. Arrested on murder, burglary, and robbery charges, Edwards was advised of his *Miranda* rights and, after some initial questioning, requested counsel. The police then ceased the interrogation. When two detectives asked to see defendant the next morning, he told a guard that he did not wish to speak to anyone. The guard replied that defendant "had to" talk to the detectives. The police then readvised defendant of his *Miranda* rights, and he ultimately gave an incriminating statement.

The crux of the majority opinion in *Edwards* is as follows:

> "* * * [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation [citation omitted], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid

> waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [footnote omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485.

Cases decided by lower courts since *Edwards* have interpreted this language as establishing a *per se* rule prohibiting any requestioning of a defendant after invocation of the right to counsel unless he initiates the communication. *See, e.g., United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *aff'd.* 672 F.2d 115 (D.C. Cir. 1982); *Vaughn v. State*, 248 Ga. 127, 281 S.E.2d 594 (1981); *State v. McCloskey*, 90 N.J. 18, 446 A.2d 1201 (1982).[5] According to these cases, *Edwards* prohibits a "totality of the circumstances" analysis unless the facts show that the accused, not the police, renewed any colloquy with the authorities. Here, of course, the Oregon Court of Appeals similarly applied *Edwards* in suppressing defendant Bradshaw's confession. For a variety of reasons, any such *per se* rule in *Edwards*

---

[5] *See also State v. Dominguez*, 97 N.M. 592, 642 P.2d 195 (N.M. App. 1982); *Hunt v. State*, 632 S.W.2d 640 (Tex. Crim. App. 1982); *United States ex rel. Kimes v. Greer*, 541 F. Supp. 632 (N.D. Ill. 1982).

should at this time be expressly abrogated by this Court.

Miranda itself does not require the imposition of a *per se* rule which elevates "initiation" to the status of a single controlling factor. Admittedly, *Miranda* used different language to describe the procedure to be followed when different rights were involved. If the accused wishes to remain silent, "the interrogation must cease," whereas, if he requests counsel, "the interrogation must cease until an attorney is present." 384 U.S. at 473-474. Nowhere, however, does *Miranda* suggest that different standards should obtain in determining whether a person has waived either right after its assertion. If anything, the contrary is suggested by *Miranda*'s discussion of the two rights in the same sentence dealing with waiver:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475.

It is significant that the right to counsel in *Miranda* is a *derivative* one. Because of the peculiar circumstances of custodial interrogation, the *Miranda* Court held that the Fifth Amendment right to silence can best be safeguarded when accompanied by the right to the presence of counsel.

Although the two rights are spoken of separately, they both flow from the same source. If there is a qualitative difference between the two, logic dictates that the right to silence is paramount since the *Miranda* right to counsel serves only as an adjunct, albeit an important one, to the protection of the Fifth Amendment privilege.[6] *Miranda* provides no basis for concluding that the converse is true and that waiver of the right to counsel is subject to a stricter standard than waiver of the right to silence. However valuable the right to counsel may be in a custodial setting, it remains auxiliary to the right to silence under the *Miranda* analysis.

Also, as this Court recognized in *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), *Miranda*'s "safeguards [are] not themselves rights protected by the Constitution." The *Miranda* "right" to counsel is a prophylaxis that enables suspects to exercise their privilege against self-incrimination in an intelligent manner. *Edwards* raises the derivative right to counsel higher than the value it seeks to protect. It not only gives the right to counsel greater worth than the right of silence: it also imbues it with a constitutional basis. *Edwards* is, therefore, in direct conflict with *Miranda* in this regard.[7]

---

[6]Both the defendant and the court of appeals relied only on the Fifth Amendment and *Miranda* as the grounds for excluding the statement in this case. Thus, any question of a purported Sixth Amendment right to counsel is not before this Court.

[7]*See The Supreme Court, 1980 Term*, 95 Harv. L. Rev. 93, 131 n. 59 (1981).

In *Michigan v. Mosley*, *supra*, the majority opinion suggested that *Miranda* "distinguished between the procedural safeguards" triggered by the exercise of the right to silence and the exercise of the right of counsel. 423 U.S. at 104 n. 10. The distinction, however, was made in response to the dissenting opinion's suggestion that questioning a person who has indicated a desire to remain silent may not be resumed until counsel is present. The *Mosley* majority responded by noting that *Miranda* forbids reinterrogation until counsel is present only when the accused has requested counsel, not when he has merely refused to answer further questions. *Id.* The majority carefully observed that a question of waiver of counsel was not before it. Thus, it neither suggested nor implied that a post-invocation waiver of counsel should be judged by any test other than the totality test applied to a post-invocation waiver of the right of silence.

Justice White's concurring opinion in *Mosley* proposed, contrary to the above-summarized reading of *Miranda*, that *Miranda* indeed "create[d] a per se rule against further interrogation after assertion of [the right to counsel]." 423 U.S. at 109-110. He further suggested a rationale for such a *per se* rule when the right to counsel is asserted and the right to remain silent is not invoked:

> "* * * [T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. * * * More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." 423 U.S. at 110 n. 2.

Edwards cites this quotation with approval and apparently incorporates the rationale into the later decision. 451 U.S. at 485.[8] However, the distinction is flawed. It should be abandoned.

The dichotomy of the two rights assumes far too much. It assumes that all defendants are the same, that all custodial interrogations are alike, and that the goals of *Miranda* can only be achieved through uniformity, regardless of factual variety. Every defendant is different and each custodial interview possesses its own character. Although one may assume that some defendants assert their right to silence because they understand their right and consider themselves capable of deciding their own fate, the same cannot be said for all. The reasons for talking or remaining mute are as varied as the

---

[8]Some post-*Edwards* cases also have incorporated this rationale. *See, e.g., Vaughn v. State, supra*; *State v. McCloskey, supra*; *State v. Collins*, 30 Wash. App. 1, 632 P.2d 68 (1981). On the other hand, there is a tendency to confuse the two rights both in their bases and in the standard for waiver. *See People v. Smith*, 120 Cal. App. 3d 746, 174 Cal. Rptr. 916 (1981).

arrestees themselves and their particular circumstances.

Similarly, it is reasonable to assume that some defendants who invoke *Miranda*'s right to counsel do so through a conscious recognition of an inability to act in their own best interests. It is just as reasonable to assume, however, that other defendants do so for many other reasons.[9] Some may be "street-wise" and invoke counsel merely as a ploy to manipulate the police. Others may simply use it as another way of saying that they want to remain silent. Still others may just be reacting spontaneously without even momentary reflection on their competence to proceed. It stands to reason that, for example, an arrested ex-police officer ordinarily functions at a different level of sophistication and awareness than does a juvenile first offender; but a single-factor approach fails to recognize this distinction.

Also, a defendant's reaction depends largely on the specifics of the questioning. References to culpability, accomplices, custodial status, and possible negotiations may precipitate different responses for wholly different reasons. Stated simply, an absolute distinction between invocation of the right of silence and invocation of the right of counsel which fails to consider individual circum-

---

[9] *Fifth Amendment — Waiver of Previously Invoked Right to Counsel*, 72 Jour. of Crim. Law & Criminology, 1288, 1303 n. 87 (1981).

stances is arbitrary and unrealistic. The distinction does injustice to the careful balance of interests between defendant and the state which *Miranda* seeks to protect.

Edwards' per se proscription of renewed questioning after a request for counsel presents significant practical and theoretical problems. Generally, any *per se* rule derives both its strength and its weakness from its inflexibility. The rule suggested by *Edwards* is no exception. Here, however, its negative features far outweigh any theoretical benefit.

In wholesale fashion, *Edwards* combines all defendants and all interrogations into one general category, irrespective of the obvious distinguishing characteristics articulated above. This approach is directly contrary to that of *Michigan v. Mosley*, *supra*, *North Carolina v. Butler*, 441 U.S. 369 (1979), and *Fare v. Michael C.*, 442 U.S. 707 (1979), all *Miranda* cases which eschewed rigid *per se* rules in favor of totality of the circumstances analysis. *Mosley*, *Butler*, and *Fare* are alike in their recognition that *Miranda*'s worthy goals can only be achieved on a case-by-case basis. *Edwards* departs from this realistic approach and assumes that each instance of custodial interrogation follows a uniform textbook example. Experience demonstrates that this assumption is unwarranted.[10]

---

[10] *See*, for example, the cases cited and discussed below at pp. 37-41. *See generally* Inbau and Reid, *Criminal Interrogation and Confessions* (2d ed. 1967).

As the court of appeals noted in the pre-*Edwards* case of *United States v. Rodriguez-Gastelum*, 569 F.2d 482, 487 (9th Cir.), *cert. denied* 436 U.S. 919 (1978), *per se* rules often cause one to lose touch with the reasons for their creation. The announced purpose of *Miranda v. Arizona* was to protect the privilege against self-incrimination and to insure that any waiver thereof was made "voluntarily, knowingly and intelligently." 384 U.S. at 444. While attempting to do just that, the *Edwards* decision, because of its broad ambit, seriously risks just the opposite. In the case at bar, the circumstances indicate a voluntary, knowing, and intelligent waiver of the right to counsel by defendant Bradshaw. Indeed, Bradshaw was reminded of his constitutional rights immediately after he asked, following his request for counsel, "[W]hat is going to happen to me now?" He was advised again of his *Miranda* rights the next morning before he submitted to a polygraph examination. However, at least as the Oregon Court of Appeals saw it, application of the *Edwards per se* rule rendered his statements to the polygraph examiner inadmissible. *Miranda* loses both credibility and effectiveness when interpreted so rigidly.

The *Edwards per se* rule allows for only one exception: initiation of the communication by the defendant. Although this permits some flexibility in application to individual defendants, it nevertheless creates unnecessary problems which detract from the achievement of *Miranda*'s relatively simple goals. What began as an inquiry into the voluntariness of an accused's statements to the police and evolved into an inquiry into the voluntariness of the waiver preceding the statements is carried one step further. Now, there must be a preliminary analysis as to who began the interchange, the questioner or the person questioned. This case demonstrates that such analysis is both difficult and not necessarily conducive to a proper application of *Miranda*. Does "initiation" relate to the precise moment of incrimination, or does it refer generally to an entire exchange or series of conversations, regardless of substantive content? How is the determination of "initiation" to be made in cases where innocuous conversation is mixed with remarks which are pertinent to the criminal investigation.[11] Is there a

---

[11]In many cases the initiation inquiry is coupled with an equally difficult question of whether there was any interrogation under the test enunciated in *Rhode Island v. Innis*, 446 U.S. 291 (1980). *See, e.g., United States v. Thierman*, 678 F.2d 1331 (9th Cir. 1982); *Trest v. State*, 409 So. 2d 906 (Ala. Crim. App. 1981); *State v. Emery*, 131 Ariz. 493, 642 P.2d 838 (1982); *State v. Innis*, ___ R.I. ___, 433 A.2d 646 (1981) (on remand), *cert. denied* ___ U.S. ___ (1982). In such cases, a trial judge must determine not only who initiated the exchange but whether it even constituted interrogation under *Innis*. Ironically, the latter determination is made under a variation of the totality of the circumstances test. *See*, 446 U.S. at 302 n. 8.

relevance test? Does the officer's intent become a factor? Can the officer lend any encouragement? Is there a minimum amount of initiation required on the part of the defendant? If so, how much? The Oregon Court of Appeals, understandably, had difficulty answering these questions and, in attempting to answer them, reached an unreasonable result in this case.

In addition to posing problems of definition and application, the term "initiation" is an inadequate standard for dealing with the multitude of factors involved in custodial defendant-police relations. There may be instances when, for some valid reason, the police *must* reinitiate verbal contact. *See White v. Finkbeiner, supra*, 611 F.2d at 192; *United States v. Wilson*, 571 F.2d 455 (9th Cir. 1978); *Commonwealth v. Harris*, ___ Pa. Super. ___ , 443 A.2d 851 (1982). For example, if new charges arise, the authorities should not be required to keep a defendant in ignorance of them. Also, the discovery of new evidence or a change in circumstances as innocuous as a transfer to a different facility may significantly alter a defendant's situation. As it stands, *Edwards* not only encourages but, under a strict reading, requires the authorities to stand mute or risk obtaining an inadmissible statement.

By chilling any post-invocation verbal contact with an accused person, *Edwards* clearly works to

the detriment of a person in custody. Its direct effect is to encourage authorities to hold defendants *incommunicado*, something which *Miranda* might view as a coercive circumstance in itself. But an even more apparent danger lies in the implicit creation of an irrevocable invocation of the right to counsel. As discussed above, defendants invoke rights for any number of reasons. If an officer is forbidden to communicate further unless the accused initiates the exchange, the officer cannot inform the defendant of any substantive information about his case or his general status without "reinitiating" conversation. That being the case, *Edwards* "imprison[s] [defendant] in his privileges." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942). The intelligent examination of options which began in *Miranda* suddenly becomes an exercise in ignorance because, unless he possesses clairvoyance or is forthright enough to ask, the defendant will know nothing of the change in circumstances. The subject of the new information, whatever it might be, could be the very thing which caused the defendant to be nonconversant in the first place, but the officer is prohibited from volunteering it.

The proper approach is the "totality of the circumstances" analysis advanced by *Mosley* and other post-*Miranda* decisions. In practice, this analysis fosters *Miranda*'s admirable goal of intelli-

gent exercise of Fifth Amendment rights, while furthering *Miranda*'s other concern, the intelligent choice of waiver. By focusing on the whole array of factual circumstances, rather than a single element, the totality test more accurately addresses the situation faced by a defendant. Because any custodial statement is usually the product of more than one circumstance, the test of the statement's admissibility logically should be multi-faceted.

Since this Court's decision in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the general test for waiver of a constitutional right has been whether there exists "an intentional relinquishment or abandonment of a known right or privilege."[12] This analysis, the Court said, depends on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* Because the Court has deemed such a standard sufficient to protect the constitutional right to silence itself, the test logically should be more than adequate in fostering *Miranda*'s derivative right to counsel.

In examining the totality of the circumstances in a case of post-invocation waiver, the origin of the renewed conversation is a highly relevant factor. In

---

[12]As Justice Powell observed in his concurring opinion in *Edwards*:

> "* * * There is no indication, in the multitude of cases that come to us each Term, that *Zerbst* and its progeny have failed to protect constitutional rights." 451 U.S. at 492 n. 2.

some cases of heavy-handed police misconduct, it may very well be the determining factor, and thus would require suppression of a subsequent confession. But in most cases, "initiation" is only one of several elements in the analysis. Whatever the particular situation, a single element of fact, to the exclusion of all others, should not control the outcome.

In the present case, defendant never contended in the Oregon courts that his confession was inadmissible under a totality of the circumstances test. His only claim was that the *per se* rule of *Edwards* rendered any waiver of his *Miranda* rights invalid because the police, not he, initiated the post-invocation conversation. Any such *per se* rule should be abandoned. The trial court's express determination of waiver based on the totality of the circumstances should be revived.

II

Even if *Edwards v. Arizona* established a *per se* rule, the Oregon Court of Appeals misapplied it in this case.

If this Court concludes that the so-called *per se* rule of *Edwards* is a correct statement of the law regarding custodial interrogation after an invocation of the *Miranda* right to counsel, the question remains whether the Oregon Court of Appeals correctly applied it to the facts at bar. The court of

appeals attributed no significance to the fact that shortly after he claimed his right to counsel, Bradshaw asked Corporal Hays, "Well, what is going to happen to me now?" The court held that defendant did not "initiate" the renewed conversation with the authorities and, thus, that the *Edwards* exception to the *per se* rule did not apply. Under a plain reading of *Edwards*, the determination of the court of appeals is wrong.

Edwards expressly addressed the situation in the present case. According to the majority opinion, police are precluded from questioning a suspect who asks for counsel

> "* * * unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 485.

After discussing this single factor in the context of defendant Edwards' confession, the Court hypothesized that a different result would have obtained had Edwards "initiated" his second meeting with the police and, in effect, "volunteered" his statements. *Id.* In discussing this event with regard to the question of "interrogation" under the analysis of *Rhode Island v. Innis, supra*, the Court added a footnote that is very pertinent here:

> "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the

> right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." 451 U.S. at 486 n. 9.

In other words, a defendant's assertion of the right to counsel is not irrevocable. If he elects, on his own volition, to reopen the dialogue with the police, the so-called *per se* rule no longer applies. Instead, traditional concepts of intelligent, knowing and voluntary waiver come into play, and the test is the multi-factor "totality of the circumstances" standard employed in a *Michigan v. Mosley* analysis.

Obviously, there are cases in which a verbal interchange between the police and an arrestee is "mixed," *i.e.*, consists of conversation both pertinent and irrelevant to the matter under investigation. Contrary to the Oregon Court of Appeals' suggestion, however, *Edwards* clearly does not render inadmissible every nonspontaneous portion of a conversation resumed at the accused's behest. Rather, if a mixed dialogue is initiated by defendant, the waiver test is an evaluation of the totality of the circumstances. Once a defendant unilaterally indicates a willingness to talk with his accuser, his prior invocation of the right to counsel must be viewed in light of other factors. The accused obviously has reconsidered his prior decision at that

point. A trial court evaluating the waiver of the presence of counsel is therefore required to make the more customary examination of all the circumstances, not just the previous assertion of the right.

The fact that what follows the "initiation" may be an amalgam of both the innocuous and the incriminating does not change the analysis. *Edwards* recognized that custodial interrogation presents no exception to the simple realities underlying all human conversation. Once a conversation starts (*i.e.*, is "initiated"), questions and answers, remarks and reactions, requests and responses, flow at will. At that point it is difficult, if not impossible, to isolate interrogation from volunteered remarks with any degree of certainty. *Edwards* recognizes this reality by abandoning a rigid *per se* rule and substituting a flexible totality of the circumstances test once the defendant, on his own, opens the channels of communication. The court of appeals failed to apply the totality standard and thus erred.

Each case of "initiation" is obviously different from others on its facts, but it is helpful to examine similar decisions by this Court and by other courts. These decisions put the Oregon Court of Appeals holding in perspective and demonstrate how the Oregon court erroneously applied *Edwards* here.

A recent *per curiam* decision by this Court, *Wyrick v. Fields*, ___ U.S. ___ , 51 U.S.L.W. 3411

(No. 82-158, Nov. 29, 1982), although factually distinguishable, demonstrates that a defendant-initiated dialogue triggers a totality of the circumstances analysis. After consulting with counsel, Fields himself initiated a conversation with military police by asking if he could take a polygraph examination. The police advised Fields of his rights and he waived them. When the polygraph results indicated that the accused had been untruthful, the officer asked him why his answers were bothering him. In response, defendant admitted having had intercourse with the woman he was accused of raping. This Court reversed an Eighth Circuit holding that evidence of the statement was inadmissible. The Court reasoned that the Eighth Circuit had failed to examine the incriminating statement under the totality of the circumstances, as required by *Edwards v. Arizona*. Because Fields opened the dialogue by requesting the polygraph, the Court said that his post-examination conversation with the officer was subject to the standard set forth in footnote 9 of *Edwards* and not the *per se* rule erroneously employed by the circuit court of appeals. This Court did not limit its admissibility ruling to remarks made contemporaneously with Fields' initiation of dialogue with police.

In *Dillard v. State*, 275 Ark. 320, 629 S.W.2d 291 (1982), the police terminated their interview after

defendant requested counsel. Much like Bradshaw, the defendant nevertheless continued, "But I want to know what this is all about." 275 Ark. at 322, 629 S.W.2d at 292. The police then told him the facts of the crime, and defendant continued the conversation. Despite repeated police warnings about his right to counsel, defendant made incriminating statements. The court held that, under *Edwards*, defendant initiated the interrogation and evidence of his subsequent statements was admissible.

Similarly, the authorities honored defendant's request for counsel by ending the initial interview in *People v. Thomas*, 98 Ill. App. 3d 852, 54 Ill. Dec. 235, 424 N.E.2d 985 (1982), *cert. denied* ___ U.S. ___ (1982). Defendant then inquired about the details of accomplices' statements linking him to the crime. An officer reread defendant his rights, and incriminating statements followed. Citing *Edwards*, the court held:

> "This voluntary reinitiation of interrogation reflects a knowing and intelligent relinquishment of the Sixth Amendment right to counsel." 98 Ill. App. 3d at 856, 424 N.E.2d at 989.

In *Leuschner v. State*, 49 Md. App. 490, 433 A.2d 1195 (1981), *cert. denied* ___ U.S. ___ (1982), the police stopped questioning defendant upon his assertion of the right to counsel. "Without the slightest instigation by the police officers," defendant continued his conversation by talking first to

his girlfriend in the officers' presence and later joining them in the discussion. 49 Md. App. at 495, 433 A.2d at 1198. The court held that there was no interrogation until after defendant had, "by his conduct, words and actions," waived his prior invocation. 49 Md. App. at 497, 433 A.2d at 1199. The police did not initiate the conversation by merely answering his request for a telephone and then listening to the garrulous defendant "uninterruptedly rattle." 49 Md. App. at 498, 433 A.2d at 1199. The court held that there was no police initiation, even if the police officers' interjections were the functional equivalent of interrogation.

After terminating an interview in *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981), the officer was on his way out the door when defendant spontaneously remarked that he was being "railroaded" by his co-defendants. The officer responded that he only had one side of the story and would gladly hear defendant's version. Without ever again mentioning an attorney, defendant gave a statement in response to formal police interrogation. Applying *Edwards*, the court held that defendant initiated the conversation and validly waived his rights.

Defendant in *State v. Blakney*, ___ Mont. ___, 641 P.2d 1045 (1982), also started talking after he asserted his *Miranda* right to counsel and before the police had left the room. They warned him of his

rights, but he said that he did not want counsel after all. In upholding the resultant confession, the court employed footnote 9 of the *Edwards* opinion to examine the totality of the circumstances of defendant's reinitiation of the colloquy with the authorities.

A pre-*Edwards* case, *United States v. Webb*, 633 F.2d 1140 (5th Cir. 1981), is also instructive. Questioning ceased upon defendant's assertion of the right of counsel. Defendant then remarked, "I want you to tell me what I'm charged with." 633 F.2d at 1141. In the process of answering defendant's question, the F.B.I. agent mentioned a co-defendant's confession. The defendant then incriminated himself. The court held:

> "While we are concerned that a suspect's request for counsel should result in an immediate end to all forms of interrogation, we believe that the information provided by the FBI agent was responsive to [defendant's] question and not an attempt to prolong interrogation." *Id.*, 633 F.2d at 1142.

Other examples of defendant-initiated conversation abound.[13] The holdings in these numerous and factually various cases isolate the aberrant decision

---

[13] *See, e.g., United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981); *State v. Piatt*, 132 Ariz. 145, 644 P.2d 881 (1981); *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981), *cert. denied* ___ U.S. ___ (1982); *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981); *State v. Ruth*, 102 Idaho 638, 637 P.2d 415 (1981); *People v. Wegman*, 101 Ill. App. 3d 634, 57 Ill. Dec. 87, 428 N.E.2d 637 (1981); *State v. Johnson*, 318 N.W.2d 417 (Iowa 1982); *Wantland v. State*, 49 Md. App 636, 435 A.2d 102 (1981) *cert. denied* ___ U.S. ___ (1982); *State v. Killay*, 430 A.2d 418 (R.I. 1981); *State v. Grisby*, 97 Wash. App. 2d 493, 647 P.2d 6 (1982).

by the Oregon Court of Appeals in the present case. The court misapplied *Edwards v. Arizona*'s standards on initiation, and its decision herein should be reversed.

In the case at bar, the trial court correctly determined that, based upon the totality of the circumstances, Bradshaw initiated further conversation and made an intelligent, knowing, and voluntary waiver of rights. After defendant's assertion of the right to counsel, Corporal Hays promptly terminated his interrogation. Defendant, on his own volition and with no prompting whatsoever, asked Hays, "[W]hat is going to happen to me now?" Hays did not immediately seize the opportunity to requestion defendant. Rather, he carefully reminded Bradshaw of his previous request for counsel, with the apparent intent of furthering, not violating, that right. Defendant responded by acknowledging that he understood his situation and that he was resuming the conversation of his own free will. In the course of the ensuing conversation, apparently while en route to the county jail, Hays broached the subject of a polygraph examination to "clear this matter up and find out actually what happened." Bradshaw reaffirmed his cooperation and agreed to take the test. When the occasion for the test arose late the next morning, the polygrapher, Trooper

Rainey, readvised defendant of his *Miranda* rights. Bradshaw waived his rights and proceeded with the polygraph examination. When Rainey advised Bradshaw that he thought Bradshaw had been untruthful during the examination, Bradshaw confessed.

Under the totality of these circumstances, it is evident that Bradshaw had intelligently, knowingly, and voluntarily abandoned and waived his previously asserted request for counsel before he made the critical admissions. *See Wyrick v. Fields, supra.* The Oregon Court of Appeals erred in holding to the contrary.

CONCLUSION

For the above reasons, the judgment of the Oregon Court of Appeals should be reversed and this case remanded for further proceedings.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
JAMES E. MOUNTAIN, JR.
Deputy Solicitor General
ROBERT E. BARTON
THOMAS H. DENNEY
STEPHEN F. PEIFER
Assistant Attorneys General
Counsel for Petitioner